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9
 10 UNITED STATES DISTRICT COURT
 11
 12 NORTHERN DISTRICT OF CALIFORNIA
 13
 14 SAN FRANCISCO DIVISION

15 E.K. WADE,) No. C 08-00001 JSW
 16 Plaintiff,) No. C 08-00021 JSW
 17 v.)
 18 ELAINE CHAO, SECRETARY OF)
 LABOR, ET AL.)
 19 Defendant.)
 20 _____)
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 28)
 THE FEDERAL DEFENDANTS'
 REPLY BRIEF IN SUPPORT OF THE
 FEDERAL DEFENDANTS' MOTION
 TO DISMISS ALL OF PLAINTIFF'S
 CLAIMS PURSUANT TO 42 U.S.C. §
 1983 AND 42 U.S.C. § 1985(3)
 Date: May 9, 2008
 Time: 9:00 a.m.
 Courtroom: 2, 17th Floor

INTRODUCTION

The Federal Defendants¹ seek dismissal with prejudice of all claims alleging violations of 42 U.S.C. § 1983 or 42 U.S.C. 1985(3). Specifically, Elaine Chao, Secretary of the Department of Labor (“DOL”), seeks dismissal with prejudice of the Seventh and Eighth causes of action in complaint C-08-00021 JSW (“DOL Complaint”). The individual defendants seek dismissal with prejudice of the entire First Amended Complaint C-08-00001 JSW (“FAC”). Plaintiff, E.K. Wade (“Plaintiff”) concedes that the entire FAC, which contained two causes of action one based upon 42 U.S.C. § 1985(3) and one based on 42 U.S.C. § 1983 should be

¹The term “Federal Defendants” refers to collectively, Elaine Chao, Secretary of Labor, and the individual defendants Elaine Chao in her individual capacity, Charles James, Woody Gilliland, Doug Betten, William Smitherman, Georgia Martin, Alice Young, Sarah Nelson, Bonnie Corley, Kathyann Batiste, Berlene Roberts and Jesus Alvarez.

1 dismissed with prejudice. Opposition at 2. Accordingly, this brief focuses only on the causes of
 2 action in the DOL Complaint.

3 As discussed in the opening brief, both the Seventh and Eighth causes of action in the
 4 DOL Complaint should be dismissed because Title VII, the Rehabilitation Act, and the ADEA
 5 provide the exclusive means of redress for employment discrimination based upon race,
 6 disability, and age and retaliation. Although Plaintiff concedes that he cannot bring his Section
 7 1985(3) and 1983 claims against the individual defendants, he argues that the Seventh and Eighth
 8 causes of action in DOL complaint should be allowed to proceed under a theory of *respondeat
 superior*. Plaintiff is wrong. Neither Section 1985(3), nor Section 1983 can be brought pursuant
 9 to a theory of *respondeat superior*. Plaintiff also argues that his claims are not preempted
 10 because he asserts constitutional violations of his First and Fourteenth Amendment rights, but
 11 this theory also fails.

12 In addition, Plaintiff's Seventh Cause of Action pursuant to Section 1985(3) should be
 13 dismissed because Plaintiff fails to allege facts showing that the DOL by way of Defendant Chao
 14 or any other defendant, engaged in a conspiracy to deprive him of his constitutional rights.
 15 Moreover, Section 1985(3) claims premised on the infringement of First and Fourteenth
 16 Amendment rights require the plaintiff to allege that the government enacted some policy or
 17 took some action that infringed on the plaintiff's rights. Plaintiff has failed to include any such
 18 allegation in his complaint, but rather relies on the alleged conduct of his co-workers to state a
 19 claim; therefore, his claim should be dismissed.

20 Finally, Plaintiff's Eighth Cause of Action pursuant to 42 U.S.C. § 1983 should be
 21 dismissed because Plaintiff cannot state a claim against the DOL where Plaintiff alleges that the
 22 DOL was acting under the "color of Federal law." The Supreme Court has held that a plaintiff's
 23 ability to allege that the defendant was acting "under color of state law" is a jurisdictional
 24 prerequisite to stating a claim under 42 U.S.C. § 1983.

25 **ARGUMENT**

26 **A. Legal Standards**

27 A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court.
 28 See, e.g., Savage v. Glendale Union High School, 343 F.3d 1036, 1039-40 (9th Cir. 2003), cert.

1 denied, 541 U.S. 1009 (2004). A motion will be granted, if the complaint when considered in its
 2 entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction. Id. at
 3 1039 n.2. Plaintiff has failed to allege facts to establish subject matter jurisdiction in this case
 4 with respect to his Eighth cause of action in the DOL Complaint, which is premised upon an
 5 alleged violation of 42 U.S.C. § 1983.

6 A court should grant a Rule 12(b)(6) motion where there is either a “lack of a cognizable
 7 legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”
 8 Balistreri v. Pacifica Police Dep’t. 901 F.2d 696, 699 (9th Cir. 1990). Moreover, a complaint
 9 must include “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic
 10 Corp. v Twombly, 127 S.Ct. 1955, 1974 (2007). To satisfy this requirement a complaint must
 11 have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of
 12 action....” Id. at 1965. Plaintiff’s complaint does not meet these pleading requirements and fails
 13 to state a claim with respect the Seventh and Eighth causes of action in the DOL complaint.

14 **B. Title VII, the Rehabilitation Act, and the ADEA Provide the Exclusive
 15 Remedies for Plaintiff’s Claims for Employment Discrimination.**

16 As extensively briefed in the Federal Defendants’ opening brief, Title VII, the
 17 Rehabilitation Act, and the ADEA provide the exclusive remedies for claims of employment
 18 discrimination. All of Plaintiff’s claims stem from his employment at the DOL. Specifically,
 19 Plaintiff claims that he was deprived of the following rights in violation of 42 U.S.C. §§ 1983
 20 and 1985(3): a) rights to equal assignments outside the State of California; b) reasonable
 21 accommodations; c) rights to advanced sick leave; d) rights to be free from retaliation for filing
 22 numerous EEO complaints, grievances, and whistle blowing; and e) rights to be free from
 23 working in a hostile work environment. DOL Complaint at ¶ 260 & ¶297.

24 Assuming *arguendo* that each of these is a cognizable right, none are substantive alone,
 25 but rather each arises from the prohibitions against discrimination in employment found in Title
 26 VII, the Rehabilitation Act, or the ADEA. As such, they cannot be redressed pursuant to 42
 27 U.S.C. §§ 1983 or 1985(3). Sections 1983 and 1985(3) only provide a means for enforcing
 28 substantive rights where no other comprehensive remedial structure exists. Great American Fed.
Sav. & Loan Ass’n. v. Novotny 442 U.S. 366, 378 (1979); City of Rancho Palos Verdes, v

1 Abrams, 544 U.S. 113, 120 (2005); Vinson v. Thomas, 288 F.3d. 1145, 1155 (9th Cir. 2002)
 2 (applying, Novotny to Rehabilitation Act claims); Sauter v. State of Nevada, Civ. No. CV-94-
 3 00892-DWH, 1998 WL 196630 at *2 (9th Cir. April 23, 1998) (finding, ADEA claims cannot
 4 state basis of Section 1985 claim). Because the Rehabilitation Act, the ADEA, and Title VII
 5 provide comprehensive schemes for redressing claims of employment discrimination, Plaintiff's
 6 Section 1983 and 1985(3) claims must be dismissed with prejudice.

7 In his Opposition to the Federal Defendants' motion to dismiss ("Opposition"), plaintiff
 8 concedes that the logic and reasoning in Novotny and Vinson apply to the instant case.
 9 Opposition at 2. Plaintiff argues, however, that the DOL is liable for the alleged actions of his
 10 co-workers under Sections 1985(3) and 1983 pursuant to a theory of *respondeat superior*. He
 11 asserts that his co-workers violated his constitutional rights to free speech and equal protection
 12 and therefore, the DOL remains liable even where the individual defendants are not. Plaintiff's
 13 claims stem from his employment. In his Opposition, Plaintiff claims that he was denied the
 14 right to complain without harassment or intimidation. This claim, if cognizable, falls within the
 15 ambit of Title VII. Further, as discussed below, even if not preempted, Plaintiff's Section
 16 1985(3) and 1983 claims fail.

17 **C. The DOL Cannot Be Held Liable Pursuant to 42 U.S.C. §§ 1985(3) and 1983
 18 Under A Theory of *Respondeat Superior*.**

19 Plaintiff concedes that Sections 1985(3) and 1983 do not provide a right of action against
 20 federal officials acting under federal law and agrees to dismiss his complaint against the
 21 individual federal defendants. Opposition at 2. Plaintiff, however, attempts to hold the DOL
 22 liable under Sections 1985(3) and 1983 based upon a theory of *respondeat superior*. Opposition
 23 at 2-3. Plaintiff states, "when... Kathyann Batiste, Berlene Roberts, and Jesus Alvarez ... under
 24 *Respondeat Superior* [sic], conspired to lure Plaintiff into that conference room ... Defendant
 25 became liable to Plaintiff for their conduct." Id. at 2

26 The theory of *respondeat superior* is not generally applicable to the civil rights statutes
 27 such as Section 1983 and 1985(3). Meza v. Lee, 669 F. Supp. 325, 326 (D. Nev. 1987) (finding,
 28 *respondeat superior* liability does not exist under the Civil Rights statutes). And, the Supreme
 Court has expressly rejected the theory of *respondeat superior* as a theory of liability for Section

1 1983. Polk County v. Dodson, 454 U.S. 312, 325 (1981) (rejecting, plaintiff's attempt to assert a
 2 Section 1983 claim against government entity under theory of *respondeat superior* stating,
 3 "Section 1983 will not support a claim based on a *respondeat superior* theory of liability.").
 4 Section 1985(3) claims require allegations of the defendant's direct involvement in the
 5 conspiracy. Cf. Brown v. Washington, 661 F.Supp. 1011, 1012 (N.D. Ill. 1987) (dismissing,
 6 Section 1985(3) claim stating "...that claim too must depend on personal and not vicarious
 7 liability."). Where the Section 1985(3) claim is against a government entity, a plaintiff must
 8 allege facts showing that the entity enacted policies and procedures that violated his rights.
 9 Meza, 669 F. Supp. at 326 (finding, there must be some allegation of action or inaction on part of
 10 the government to support a Section 1983 claim). As discussed below, Plaintiff cannot make
 11 such allegations against the DOL. In sum, the theory of *respondeat superior* is not generally
 12 applicable to civil rights statutes and Plaintiff must allege direct action by the DOL; he has not
 13 and cannot meet this requirement.

13 **D. Plaintiff's Seventh Cause of Action for Alleged Violation of 42 U.S.C. §**
 14 **1985(3) Should be Dismissed.**

15 Plaintiff argues that his Section 1985(3) claim is not preempted by Title VII because it is
 16 based upon a violation of his First Amendment right to freedom of speech and his Fourteenth
 17 Amendment right to equal protection. Opposition at 2. Specifically, Plaintiff argues that he was
 18 intimidated and demeaned in violation of Section 1985(3) for exercising his right to "freedom of
 19 speech to complain..." Id. Even if the Court were to construe Plaintiff's allegation as a
 20 conspiracy to infringe his First and Fourteenth Amendment rights separate and apart from Title
 21 VII, his Section 1985(3) claim still fails because Plaintiff has not allege facts to state a claim.²

22

23 ²The authority cited by the Plaintiff in support of his Section 1985(3) claim is misquoted
 24 and is not controlling. First, the Plaintiff misquotes Black v. City and County of Honolulu, 112
 25 F.Supp. 2d. 1041 (D. Hawaii 2000). The actual language from the case is "Title VII does not
 26 preempt an action under § 1983 for a violation of the Fourteenth Amendment." Id. at 1057
 27 (emphasis added). The court then goes on the state that Novotny holds that Section 1985(3) is
 28 not a remedy for Title VII violations. Moreover, Black, was decided before the Ninth Circuit
 issued its opinion in Vinson in 2002, which clearly applies the Novotny rationale to limit claims
 for redress of employment discrimination to statutory schemes created by Congress. Similarly,
Roberts v. College of the Desert, 870 F.2d 1141 (9th Cir. 1988) was decided before the Supreme

1 **1. Plaintiff Has Failed To State Facts Showing A Conspiracy.**

2 As discussed in the Federal Defendants' opening brief, Plaintiff has failed to allege facts
 3 to show the existence of a conspiracy.³ MTD at 12-13. A claim pursuant to Section 1985(3)
 4 must allege facts to support the allegation that the defendants conspired together. A mere
 5 allegation of conspiracy without factual specificity is insufficient. Wells v. Board of Trustees of
 6 California State University, 393 F. Supp.2d 990, 996 (N.D. Cal. 2005)(dismissing, complaint
 7 where plaintiff failed to allege that the defendants agreed among themselves to deprive him of
 8 equal protection of the law); see also Duarte v. Freeland, Civ. No. C05-02780 MJ, 2007 WL
 9 2790591 *3-4 (N.D. Cal. Sept. 24, 2007). Plaintiff's complaint fails to allege any facts to show
 10 agreement among the defendants to deprive him of any rights, and he offers no response to this
 11 argument in his Opposition. Rather, he simply states the elements of a claim for Section 1985(3)
 12 and then in a conclusory fashion states that those elements have been met. Opposition at 2-3.
 13 This is not sufficient to save his claim. Legal conclusions devoid of specific facts cannot support
 14 a claim of conspiracy. Logan v. West Coast Benson Hotel, 981 F.Supp. 1301, 1317 (D. Or
 15 1997).

16 Plaintiff's complaint is replete with conclusory allegations of conspiracy without any
 17 factual basis to support his claim. See, e.g., DOL Complaint at ¶¶ 237 & 248. Plaintiff must
 18 plead facts showing an agreement by the defendant to deprive him of his constitutional rights; the
 19 identification of various actions taken by individual defendants is not sufficient. Duarte, 2007
 20 WL 2790591 at *4 (dismissing, claim even though plaintiff identified various actions taken by
 21 defendant, he failed to allege facts showing an agreement by defendants to deprive him of equal
 22

23 Court applied the Novotny rational to Section 1983 claims in City of Rancho Palos Verdes, v
 24 Abrams, 544 U.S. 113, 120 (2005).

25 ³Now that the only defendant is the DOL, there is an open question as to whether plaintiff
 26 could ever state a claim under the intra-corporate conspiracy doctrine, which provides that agents
 27 within an entity cannot conspire with themselves. Lester v. Mineta, Civ. No C-04-3074 SI, 2006
 28 WL 463515 at *3-4 (N.D. Cal. Feb. 24, 2006).

1 protection). Plaintiff has failed to allege such facts and this is his fifth attempt to state a claim
 2 against the DOL; consequently, his Section 1985(3) claim should be dismissed with prejudice.

3 **2. Plaintiff Has Failed To Allege Governmental Action Taken By the
 4 DOL That Infringes Upon His First and Fourteenth Amendment
 Rights.**

5 Plaintiff's Section 1985(3) claim against the DOL fails for an additional reason, "a
 6 conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved
 7 that the state is involved in the conspiracy or that the aim of the conspiracy is to influence
 8 activity of the state." United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S.
 9 825, 830 (1983) (addressing, Section 1985(3) and finding, that the First and Fourteenth
 10 Amendments only protect the individual against state action not wrongs by individuals).⁴
 11 Accordingly, to the extent that Plaintiff's Section 1985(3) claim is premised on infringement on
 12 his First and Fourteenth Amendment rights, as he now claims, he must allege that the DOL was
 13 somehow involved in the conspiracy to deprive him of his rights. Id. at 833.⁵

14 Here, Plaintiff has failed to assert any action by the DOL that allegedly infringes upon his
 15 rights, but rather relies solely on conduct allegedly engaged in by his co-workers Batiste, Roberts,
 16 and Alvarez. Opposition at 2. Moreover, it is unlikely that Plaintiff can amend his complaint to
 17 allege such action by the DOL, because Plaintiff has already made several attempts to state a
 18 claim. Because Plaintiff fails to allege any policies or procedures implemented by the DOL that
 19 infringe upon his First and Fourteenth Amendment rights his section 1985(3) claim against the
 20 DOL fails.

21 **E. The DOL Cannot Be Sued Pursuant To 42 U.S.C. § 1983.**

22 As discussed in the Defendants' opening brief, the DOL as a federal agency cannot be

23
 24 ⁴It should be noted that although Plaintiff is pro se he should have been aware of this
 25 requirement because he cites the United Brotherhood in his Complaint. DOL Complaint at ¶
 26 246.

27 ⁵This requirement is somewhat unique to Section 1985(3) claims premised upon
 28 infringement of First and Fourteenth Amendment rights because those Amendments apply only
 to government conduct.

1 held liable under Section 1983. See MTD at 5&11. “Section 1983 only entitles plaintiffs to
 2 relief against state actors and not federal actors.” Lester, 2006 WL 463515 at *2. Because
 3 Section 1983 is based upon the Fourteenth Amendment, it concerns deprivations of rights that
 4 are accomplished under color of state law. Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir.
 5 1980). Federal actors acting within the course and scope of their federal employment as Plaintiff
 6 has alleged cannot be sued under this statute. Lester, 2006 WL 463515 at *2.

7 Moreover, the Supreme Court has interpreted the “under color of state law” provision to
 8 be a jurisdictional requirement to state a Section 1983 claim. Polk, 454 U.S. at 315 (requiring,
 9 plaintiff to plead facts showing acts under color of state law as “jurisdictional prerequisite”); see
 10 also Gillespie, 629 F.2d at 641 (affirming, motion to dismiss Section 1983 claim based upon
 11 lack of subject matter jurisdiction because federal employees were not acting under color of state
 12 law). It is well-settled that a party seeking to exercise the district court’s jurisdiction has the
 13 burden to establish such jurisdiction exists. Kumpf v. Secretary of Army, Civ No. 95-3050
 14 MMC, 1996 WL 432330 at *2 (N.D. Cal. July 30, 1996). This jurisdictional requirement is
 15 insurmountable for Plaintiff who has not and cannot allege that the DOL, a federal agency (or its
 16 federal employees acting within the scope of employment), were acting under color of **state** law.
 17 And indeed, Plaintiff offers no response to this argument in his Opposition. This fact alone is a
 18 sufficient basis to dismiss Plaintiff’s Section 1983 claim against the DOL with prejudice.

CONCLUSION

19 For the foregoing reasons the Court should grant the Federal Defendants’ Motion to
 20 Dismiss in its entirety.

21 Respectfully submitted,

22 JOSEPH P. RUSSONIELLO
 23 United States Attorney

24 Dated: April 11, 2008
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of the following:

The Federal Defendants' Reply Brief In Support Of Motion to Dismiss

to be served this date upon the party in this action by placing a true copy thereof in a sealed envelope, and served as follows:

FIRST CLASS MAIL by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

PERSONAL SERVICE (BY MESSENGER)

FEDERAL EXPRESS

FACSIMILE (FAX) Telephone No.: See Below

to the party(ies) addressed as follows:

E.K. Wade
542 North Civic Drive, Apt. D
Walnut Creek, CA 94597

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 11, 2008 at San Francisco, California.

CAROL WEXELBAUM
Legal Assistant